

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Temporary Immediate
Suspension of the Family Child Care
License of Bagwantee Jayaswal To
Provide Family Day Care

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

The above matter came on for a contested case hearing before Administrative Law Judge M. Kevin Snell ("ALJ") at the Hennepin County Health Services Building, 525 Portland Avenue, Minneapolis, Minnesota 55415, on December 5, 2012. The hearing record closed on December 5, 2012 at the end of the hearing.

Grace C. Song, Assistant Hennepin County Attorney, Minneapolis, Minnesota, appeared on behalf of the Department of Human Services ("Department") at the hearing. Teresa J. Ayling, Hellmuth & Johnson, PLLC, Edina, MN, appeared on behalf of Ms. Bagwantee Jayaswal, ("Licensee").

STATEMENT OF THE ISSUE

The issue is whether the Department of Human Services' order of temporary immediate suspension of Licensee's family day care license should continue.

The Administrative Law Judge concludes that the temporary suspension should not be continued.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Until a Temporary Immediate Suspension ("TIS") of Ms. Jayaswal's license to provide family child care services on November 5, 2012, she provided such services for children in her home in Minneapolis, Minnesota ("the home").¹

2. English is a second language for Licensee. Her primary language is French.² Licensee first came to the United States in 1999.³ Licensee's syntax, or sentence structure, both orally and in writing, is occasionally slightly unlike native

¹ Ex. 8; Testimony of Barbara Clifton, Hennepin County (the County) Family Child Care Licensors, & Bagwantee Jayaswal.

² *Id.*

³ Test. of B. Jayaswal.

English speakers. Licensee does understand English well and does not need the assistance of an interpreter.⁴

Licensing History

3. Licensee was first licensed on January 5, 2012, under a Class B2 - Specialized Infant & Toddler license. The B2 license allows her to care for up to six children, no more than four of who may be under school age, with not more than two infants. Licensee started caring for her first day care child in March 2012.⁵

4. Previously Licensee had worked as an employee at day care centers for 12 years, providing care in infant, toddler, and preschool rooms. She had received all necessary training to work in a day care, including first aid, CPR, SIDS and shaken baby training.⁶

Program Conditions

5. When Licensee's home was first licensed, the County erred in not licensing a bathroom for use by children and not licensing the kitchen.⁷

6. Licensee's first County licensor gave Licensee a high chair and a Grayco mesh crib in February 2012.⁸

7. Licensee's first County licensor also provided her with a 2001 document titled "Lowering the Risk of Sudden Infant Death Syndrome – A handout for people assisting in the care of infants in licensed family child care." Among other directions, the document stated:

Make sure babies' head and face stay uncovered during sleep. Keep babies' mouths and noses clear of blankets and other coverings during sleep. Use sleep clothing with no other covering over the baby. **If you do use a blanket or other covering, make sure the baby's feet are at the bottom of the crib, the blanket no higher than the baby's chest, and the blanket tucked in around the crib mattress.**⁹

8. The 2001 guidance is contrary to current and acceptable infant sleep practices, which preclude blankets or any other objects in an infant's crib.¹⁰

⁴ Observations of the ALJ at the hearing; and Test. of B. Jayaswal.

⁵ Ex. 12; Test. of B. Clifton and B. Jayaswal.

⁶ Test. of B. Jayaswal.

⁷ Test. of B. Clifton.

⁸ Test. of B. Jayaswal; Ex. 14.

⁹ Ex. 22; Test. B. Jayaswal.

¹⁰ Exs. 25, 26; Test. of B. Jayaswal and B. Clifton.

9. On and before November 1, 2012, Licensee was following the 2001 guidance and did utilize blankets for infant sleeping in accordance with its directions.¹¹

10. On and before November 1, 2012, Licensee utilized three mesh cribs – two for infants and one for toddlers. When the cribs were not in use, Licensee folded and stored blankets under the crib mattresses, which made the mattresses lumpy.¹²

11. Until November 5, 2012, Licensee had two infants and two toddlers in her care.¹³

12. Licensee's hours of operation are from 7:00 a.m. to 6:00 p.m., Monday through Friday.¹⁴

November 1, 2012 - First Relicensing Visit

13. On November 1, 2012, a County Licensur conducted Licensee's first relicensing visit. She found a number of safety violations that she, the Licensee, and Licensee's husband corrected during the visit. The Licensur educated Licensee about all of the alleged violations. Licensee asked appropriate questions and she and the Licensur had back and forth conversations. Both Licensee and her husband were very cooperative throughout the visit.¹⁵

14. The Licensur advised Licensee that both her bathroom and kitchen needed to be licensed for day care.¹⁶

15. The Licensur was concerned about what she considered unsafe sleep practices. Although no children were napping at the time of the visit, Licensee's practice of storing blankets under the mattresses concerned her because she believed Licensee placed children down to sleep on the mattresses with the blankets still under the mattresses.¹⁷

16. The Licensur was most concerned, and incensed, when she believed she heard Licensee state that she placed a blanket over the head of an infant until s/he went to sleep.¹⁸

17. When the Licensur had Licensee occupied with checking paperwork, she observed Licensee's husband pick up an infant that was crying. She told him he could

¹¹ *Id.*

¹² Test. of B. Jayaswal.

¹³ Test. of B. Clifton.

¹⁴ Test. of B. Jayaswal.

¹⁵ Test. of B. Clifton; Ex. 2.

¹⁶ Test. of B. Jayaswal.

¹⁷ Test. of B. Clifton.

¹⁸ *Id.*

not do that until he had taken SIDS and SBS training. He complied and put the infant back down.¹⁹

18. In addition, the Licenser was concerned about a toddler that was falling asleep in a high chair while eating. Licensee would clap her hands to wake up the child. The child would take a bite and fall asleep again, raising concern about choking. The Licenser directed Licensee to remove the child from the high chair and advised her that she would not leave the home until the child was out of the high chair.²⁰

19. After the licensing visit, the Licenser dictated a report and completed a correction order dated November 1, 2012. However, the County did not share the Correction Order with the Licensee.²¹

20. On November 2, 2012, the Licenser consulted with her supervisor about the licensing visit.²²

Remedial Measures Taken on November 1, 2012, and Thereafter

21. The Licenser, the Licensee, and Licensee's husband corrected the following deficiencies while the Licenser was present on November 1, 2012: blankets and soft toy removed from above and under crib mattresses; loose fitting sheets removed; crib model number found for Grayco crib and inserted on crib inspection sheet; all toxins, box cutter and other hazards removed from home and placed in garage or on shelves requiring Licensee to utilize a step-stool to access them; plastic bags removed from day care area; crock pot moved from day care area to kitchen; mini blind cord secured properly; and the loose electrical face plate in front bedroom secured.²³

22. Licensee took the following additional remedial measures after November 1, 2012:

- a. On November 6, 2012, the County sent Licensee a packet of information regarding correct infant sleep practices, SIDS, new crib standards and information about fitted crib sheets.²⁴ Licensee studied all of the information, checked her cribs against the federal requirements, understands it, and will comply with it in the future,²⁵ and

¹⁹ *Id.*; Test. of Bijay Jayaswal; Ex. 2.

²⁰ Test. of B. Clifton

²¹ *Id.*; Ex. 1; Test. of T. Hennessey, Senior Social Worker and Quality Assurance Specialist for Hennepin County Human Services and Public Health Department.

²² *Id.*

²³ *Id.*; Test. of Bijay Jayaswal and B. Clifton.

²⁴ Ex. 21.

²⁵ Test. of B. Jayaswal.

- b. At Licensors suggestion on November 1, 2012, Licensee attended the County's two-hour November 15, 2012 course titled, "Ready for Renewal?"²⁶ and
- c. Mr. Jayaswal, Licensee's husband, has repaired the front door and made arrangements with Licensee's insurance agent for liability insurance;²⁷ and
- d. Mr. Jayaswal also took the Shaken Baby Syndrome training on November 5, 2012;²⁸ and
- e. Licensee's entire home, including the kitchen and living room, has been childproofed in accordance with the Department's safety regulations. The unapproved gate and screen system between the day care area and the living room has been removed. Licensee has requested that the entire home be inspected for licensure;²⁹ and
- f. Licensee purchased two slatted, wooden cribs manufactured by Sheffield that meet all state and federal requirements for use by infants. The mattresses are secure and only fitted sheets are used;³⁰ and
- g. Licensee took the Gulliver crib out of her house and discarded it;³¹ and
- h. All crib inspection forms are current and up to date;³² and
- i. Bleach and Lysol near the changing table are located in a basket hanging on the wall at a height that cannot be reached by children;³³ and
- j. Fire extinguisher was serviced on November 13, 2012, and is current;³⁴ and
- k. Single use towels and available for Licensee and children;³⁵ and

²⁶ *Id.*; Ex. 24; Test. of B. Clifton.

²⁷ Test. of Bijay Jayaswal.

²⁸ *Id.*

²⁹ Test. of B. Jayaswal.

³⁰ Test. of B. Jayaswal; Ex. 17.

³¹ Test of B. Jayaswal.

³² *Id.*; Exs. 13, 14, 16, 17.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

- I. All required forms for transportation, medicines, immunizations and otherwise have been secured, are current and are now reflected in a diary indicating when updates are required;³⁶ and
- m. Licensee is now active in a day care providers association.³⁷

Procedural Findings

23. On November 2, 2012, after consultation with the Department, the County Quality Assurance Specialist recommended that Ms. Jayaswal's day care license be immediately suspended.³⁸

24. The Department issued an order of temporary immediate suspension on November 5, 2012.³⁹

25. Licensee filed a timely appeal of the order of temporary immediate suspension on November 6, 2012 and requested an appeal hearing pursuant to Minn. Stat. § 245A.07, subd. 2a.⁴⁰

26. On November 17, 2012, the Department's Division of Licensing executed a Notice of and Order for Hearing, scheduling a contested case hearing on December 5, 2012.⁴¹

27. On November 26, 2012, the Administrative Law Judge issued a Prehearing Order and Protective Order, which was served upon the parties that day.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner of Human Services and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50 and 245A.07, subds. 2 and 2a.

2. The Department of Human Services gave proper and timely notice of the hearing in this matter.

3. The Department has complied with all relevant substantive and procedural requirements of law and rule.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Ex. 1; Test. of T. Hennessey.

³⁹ Ex. 8.

⁴⁰ Ex. 9.

⁴¹ Notice and Order for Hearing.

Burden of Proof and Standards for Maintaining a TIS

4. Pursuant to Minn. Stat. § 245A.07, subd. 2., in order to sustain a temporary immediate suspension, the Department must show that reasonable cause exists to believe that Licensee's failure to comply with applicable law or rule poses a current imminent risk of harm to the health, safety, or rights of persons served by her.

5. "Reasonable cause" for the purpose of a temporary immediate suspension means:

there exist specific articulable facts or circumstances which provide the commissioner with a reasonable suspicion that there is an imminent risk of harm to the health, safety, or rights of persons served by the program.⁴²

Findings Regarding Reasonable Cause

6. When the Order was issued on November 5, 2012, there was reasonable cause to believe that all of the children in Ms. Jayaswal's care were at imminent risk of harm due to unsafe infant sleep practices.

7. At the hearing, Licensee and the testimony of the Hennepin County licensor demonstrated that Licensee has taken all necessary steps and is willing to take further remedial measures to prevent any future similar situations. No reasonable cause now exists to believe that the children in Licensee's care would be at imminent risk of harm.

8. There is a lack of specific articulable facts or circumstances which would provide the commissioner with a reasonable suspicion to conclude that Licensee presents a current, imminent risk of harm to children. The Department has failed to demonstrate that "reasonable cause" now exists to continue the immediate suspension of Ms. Jayaswal's day care license.

9. These Conclusions are reached for the reasons set forth in the Memorandum below, which is hereby incorporated by reference into these Conclusions.

10. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions, and as Findings any Conclusions that are more appropriately described as Findings.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

⁴² Minn. Stat. § 245A.07, subd. 2.

RECOMMENDATION

Based upon these Conclusions, the Administrative Law Judge recommends to the Commissioner of Human Services that:

The temporary immediate suspension of the family day care license of Bagwantee Jayaswal be immediately withdrawn and rescinded.

Dated: December 19, 2012

s/M. Kevin Snell

M. KEVIN SNELL
Administrative Law Judge

Reported: Digitally recorded; no transcript prepared.

NOTICES

Human Services (the Commissioner) will make the final decision after a review of the record. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten calendar days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Lucinda Jesson, Commissioner of Human Services, P.O. Box 64998, St. Paul MN 55155, (651) 431-2907 to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Report and the presentation of argument the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and Administrative Law Judge of the date the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within ten working days to allow the Judge to determine the discipline imposed.

Under Minn. Stat. § 14.62, subd. 1, the Commissioner is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Burden of Proof

When a temporary immediate suspension is appealed, the scope of the appeal hearing is limited solely to the issue of whether the temporary immediate suspension “should remain in effect” pending a final order issued on a subsequent licensing review. Further, the burden of proof is limited to the Department’s demonstration that reasonable cause “exists” to believe that the license holder’s actions or failure to comply with applicable law or rule “poses” an imminent risk of harm to the health, safety, or rights of those served by the licensee. Thus, the Administrative Law Judge is required to address the current situation and not only whether the temporary immediate suspension was properly issued at the time and not just whether reasonable cause existed at the time the temporary immediate suspension was issued.

Permitted Evidence

During an expedited hearing regarding a temporary immediate suspension, the Department must only present reliable oral testimony and/or reliable documentary evidence in support of a finding of reasonable cause. The Department and the Administrative Law Judge are entitled to rely on hearsay evidence linking the license holder (or any person present during the hours that children are in care) to an act that places children at risk of imminent harm.

At this stage, the Department of Human Services is not required to prove that actions by individuals or violations actually occurred. Instead, at this stage, the Department must only prove that there is reasonable cause to believe that the health, safety or rights of persons in the Licensee’s care are at imminent risk. This is a modest standard, intended to insure that vulnerable children are protected until there can be a full hearing and final determination on the underlying charges.

The Administrative Law Judge, at this stage of the process, is not required to assess the relative credibility of conflicting testimony or statements, but rather is to determine whether there is enough evidence to maintain the suspension. In this case, there was conflicting testimony regarding only one material fact - whether or not Licensee admitted to placing a blanket over the heads of infants before they went to sleep. The Licensee testified that she has never done that and that she did not say to the Licenser that she did that. The Licenser testified that Licensee told her that Licensee had engaged in such a practice. The resolution of that dispute is unnecessary to the decision in this matter. The Licenser’s understanding was certainly a relevant factor in determining that a TIS was necessary. However, Licensee’s testimony at the hearing was such that the ALJ is convinced she has a firm grasp of correct SIDS infant sleeping protocol at this time and has committed to never placing a blanket over the head of an infant.

Necessity of Current “Imminent Risk of Harm”

However, as serious as the Licensee’s various rule violations were, and even when the evidence offered by the Department is reviewed in light of the modest “reasonable cause” standard of proof, it is concluded that the evidence is not sufficient to establish reasonable cause to continue the temporary immediate suspension. The Department was entitled to make a preliminary determination, relying on the results of the licensing visit and interviews, including information misunderstood by the Licensor, to suggest that Licensee held a serious misunderstanding of the infant sleeping requirements and SIDS protocols.

However, the evidence submitted by Ms. Jayaswal and the Licensor establishes that the situations on November 1, 2012 and now are entirely different. Licensee has corrected all alleged violations, notably – without the benefit of seeing the written correction order. Licensee’s remedial measures taken both immediately during the inspection and after, the normal situation now, rise to the level where the Administrative Law Judge is convinced that: the Licensee completely understands and is committed to utilize proper infant sleeping procedures in compliance with SIDS protocols, and that the other rule violations are unlikely to reoccur.

Conclusion

Based on the foregoing reasons, there is no imminent risk of harm to the health, safety, or rights of the children served by Ms. Jayaswal at this time. The Administrative Law Judge respectfully suggests to the Commissioner that the Department no longer has reasonable cause to continue the suspension.

M. K. S.